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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

323

HUGH SMITH, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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Reply to Brief for the Respondent in Oppositon

I.

Respondent questions whether the Petitioner is in fact seeking review of *State* v. *Smith*, 123 So. 2d 700 (dated October, 1960), rather than the denial of certiorari by the Supreme Court of Florida in *Smith* v. *State*, 143 So. 2d 491 (dated May, 1962) and, if not, why the Petition refers to the opinion of the Supreme Court of Florida in the former case. The answers are simple. Petitoner did not seek review of *State* v. *Smith* in 1960 because that opinion and

decision did not convict him. He was not convicted until after his subsequent trial before the Criminal Court of Record in and for Dade County. Moreover, it was impossible at that time to ascertain how the opinion of the court would be applied to the facts and circumstances of Petitioner's case. The Petition makes it abundantly clear, as admitted by Respondent, that Petitioner is hereby asking this Court to review the May, 1962, denial of certiorari in *Smith* v. *State*. The Petitioner makes continual reference to the previous opinion of the Florida Supreme Court because that opinion very obviously underlies both the conviction of the Petitioner by the lower Florida courts and the final denial of certiorari by the Supreme Court of Florida.

II.

Respondent contends that the denial of certiorari by the Supreme Court of Florida was based on its lack of jurisdiction, an adequate "state ground." That argument must be rejected. Respondent's statement that Petitioner's conviction by the trial court had to be appealed directly to the Florida Supreme Court is erroneous, for Rule 2.1 (5)(a) of the Florida Appellate Rules is permissive and not mandatory. It provides that the appeal "may" be taken from the trial court directly to the Supreme Court. Only in cases where the trial court "passes directly" on the validity of the Constitution or a statute must review be sought directly in the Supreme Court. *Robinson* v. *State*, 132 So. 2d 3. This was not such a case. The validity of the statute in question had already been directly passed upon and decided by the Supreme Court in *State* v. *Smith*, *supra*. The trial court, as its decision demonstrates, was limited to findings of fact and conclusions of law as circumscribed by the *State* v. *Smith* decision. Accordingly, Petitioner chose to appeal the conviction to the Circuit Court under Article V, Section 6(3) of the Florida Con-

stitution. That provision states that Circuit Courts "shall have final appellate jurisdiction . . . of all misdemeanors tried in criminal courts of record. . . ." That appeal was perfectly proper.

Thereafter, while it might have been the proper course for Petitioner to have sought a writ of certiorari before an appropriate District Court of Appeal, Petitioner chose instead to exhaust his state court remedies by direct review in the Supreme Court of Florida. That Court, whether rightly or wrongly, did assume jurisdiction in order to deny certiorari. The Court did not dismiss the Petition, as it would have done had jurisdiction been lacking, but considered the Petition and denied certiorari.

It is seriously doubted that the Supreme Court *has the power* to deny certiorari for lack of jurisdiction where another appellate court has such jurisdiction over the case. Article V, Section 4(2) of the Florida Constitution states:

> "The supreme court *shall* provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked." (emphasis supplied).

Had the Court in this case deemed its jurisdiction lacking, it would not have denied certiorari but would have transferred the case to the proper appellate court. That has been its consistent practice. Thus, in *Robinson* v. *State, supra,* a petition for a writ was wrongly filed with the Court, and a motion was made to dismiss for lack of jurisdiction. The Court, however, did not dismiss the petition but considered it as a motion to transfer, and ordered the case transferred to the appropriate District Court of Appeals. Had Respondent in this case filed a similar motion, or had the Court deemed its jurisdiction wrongly invoked, the Court would not have denied certiorari, but

would have instead remanded the case to the appropriate District Court of Appeals.

The foregoing makes it manifest that the denial of certiorari in the instant case was based not on lack of jurisdiction but on the Court's view of the merits. No further opinion was needed. So far as that Court was concerned, everything that had to be said by way of explanation for its decision had already been amply stated in *State* v. *Smith, supra*. The denial of certiorari finally and simply wrote *finis* to these proceedings in the state courts of Florida.

III.

Equally compelling is the fact that Respondent has effectively waived its right to make the foregoing argument. Unlike the Respondent in *Robinson* v. *State, supra,* the Respondent here did not make a motion to dismiss the petition before the court below. Nor did Respondent by any other means raise the contention of lack of jurisdiction before that court. A comparison of the court's action here with its decision in *Robinson* v. *State* demonstrates that the court does not act on its own motion but solely on that of the litigants. The argument that the Supreme Court of Florida did not have jurisdiction to entertain the petition for a writ of certiorari was obviously available to Respondent before that Court, but Respondent did not raise it. Under principles long ago established by this Court, the Respondent, having failed to make the instant argument before the court below, may not now press it before this Court. *U.S.* v. *Hoffman,* 335 U.S. 77 (1948); *Ex parte Century Indemn. Co.,* 305 U.S. 354 (1938).

IV.

Petitioner respectfully submits that its petition to this Court, raising substantial issues relative to basic rights of unions and individuals under federal law and the Con-

stitution, should not be denied on a ground that was not raised in the courts below and that makes an unfounded and erroneous assumption as to the underlying basis of the decision below.

Respectfully submitted,

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